STATE'S RESPONSE TO DEFENDANT'S MOTION TO SEVER COUNTS

Rule 404(c), Arizona Rules of Evidence: Two brothers were child molest victims; acts against each brother occurred within same six-month period and were similar in nature. Thus, no expert testimony was needed to establish defendant's emotional propensity to commit unnatural sex acts with little boys. Severance also would thwart the goals of judicial economy and speedy justice.

The State of Arizona, in response to the defendant's Motion to Sever Counts, opposes the motion and asks this Court to deny it. Rule 13.4(b), Ariz. R. Crim. P., states that a defendant is not entitled to sever the charges if evidence of the severed charges would be admissible at the trial on the other charges. This Response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS:

The victims are Morgan T. and John-Paul T. Morgan was born on November 5, 1986 and John-Paul was born on February 13, 1991. The defendant's father, Daniel Byrne, lived with Terri J., the mother of Morgan and John-Paul. The defendant moved in with the family in May or June 1996 and stayed with them until November 1996.

Sometime in December 1996 to January 1997, the defendant's sister Tandy told Daniel and Terri that she had seen improper behavior between the defendant and the victims. Daniel and Terri then questioned the victims separately. Morgan stated that the defendant had promised to give him his Nintendo in exchange for performing oral sex on the defendant and allowing the defendant to perform anal sex on Morgan. John-Paul also disclosed that the defendant had engaged in sex with him as well. Terri did not call the police at that time because the defendant was Daniel's son and she did not want the defendant to go to jail.

In the meantime, Terri J.'s other son Adam J. was convicted of molesting his female cousins and was ordered to attend sex offender counseling. In October 1997, while Terri was in sex offender counseling with Adam, Terri told the counselor that the defendant had molested Morgan and John-Paul. The counselor told Terri that if she did not call the police, the counselor would. This conversation prompted Terri to report the molestations to the police.

The police interviewed both Morgan and John-Paul. Morgan said that the defendant had sexual activity with him several times, although he could not remember exactly what happened. Morgan did recall the last incident. It happened when Morgan was in 4th grade, before his birthday. The defendant promised to give Morgan his Nintendo if Morgan would have sex with him. At that time he was in the defendant's bedroom when the defendant put his penis in Morgan's anus. At this time, Morgan also performed oral sex on the defendant. Morgan stated that he also saw the defendant do the same things with John-Paul.

John-Paul is shyer than Morgan is. John-Paul told the police about one incident in which the defendant put his penis in his butt. John-Paul believes that both parties had their clothes on at the time. The defendant told him not to tell anyone.

As a result of Morgan and John-Paul's statements to the police, the defendant is now charged with one count of sexual conduct with a minor and two counts of child molestation.

II. ARGUMENT:

The counts involving John-Paul should not be severed from the counts involving Morgan because evidence that the defendant sexually abused John-Paul would be admissible in a trial involving Morgan and vice-versa.

The defendant now moves to sever the count with John-Paul as the victim from the charges in which Morgan is the victim. Count one, sexual conduct with a minor, relates to the incident in which Morgan performed oral sex on the defendant. Count two, child molestation, relates to the incident in which the defendant put his penis in Morgan's anus. Count three, child molestation, relates to the incident in which the defendant put his penis in John-Paul's anus.

Rule 13.4, Ariz. R. Crim. P., governs the severance issue. Rule 13.4(b) provides:

> b. As of Right. The defendant shall be entitled as of right to sever offenses joined only by virtue of Rule 13.3(a)(1**), unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately.**

[Emphasis added]. Under this Rule, if evidence of other crimes is admissible at a particular trial, then a defendant is not entitled to sever the charges related to the other crimes as a matter of right. This Rule directly applies in this case. Under the applicable rules of evidence, counts one and two (the charges with Morgan as the victim) would be admissible in a trial on Count 3, the charge with John-Paul as the victim, to show that the defendant had a propensity to commit sexually aberrant offenses under Rule 404(c), Arizona Rules of Evidence. Rule 404(c) provides:

(c) Character evidence in sexual misconduct cases

> In a criminal case in which a defendant is charged with having committed a sexual offense, . . . evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.
>
> 1.In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

> (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
>
> (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
>
> (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:
>
> > (i) remoteness of the other act;
> > (ii) similarity or dissimilarity of the other act;
> > (iii) the strength of the evidence that defendant committed the other act;
> > (iv) frequency of the other acts;
> > (v) surrounding circumstances;
> > (vi) relevant intervening events;
> > (vii) other similarities or differences;
> > (viii) other relevant factors.
>
> (D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

A. Rule 404(c)(1)(C)(i): The defendant's sexual contact with Morgan is not remote in time to the defendant's sexual contact with John-Paul.

The defendant lived with Morgan and John-Paul from May 1996 to November 1996. His sexual contact with both victims occurred during the same six-month time period.

B. Rule 404(c)(1)(C)(ii): Defendant's sexual contact with Morgan is similar to the defendant's sexual contact with John-Paul.

There are many similarities in this case. The defendant presumably chose both of his victims out of convenience, because both of the victims lived with the defendant at the time. Both victims are the sons of the defendant's father's girlfriend. The defendant engaged in the same sexual conduct with both Morgan and John-Paul. Both victims stated that the defendant would put his penis in each of their butts.

C. Rule 404(c)(B): The evidence shows that the defendant has an emotional propensity to commit sex acts with male children.

The similarities in this case, including the relationship between the defendant and the victims, the living arrangement, and the same type of conduct, all show that the defendant has a emotional propensity to have sexual contact with the victims. Cf. *State v. Crane*, 166 Ariz. 3, 799 P.2d 1380 (App. 1990) (court found acts of vaginal intercourse with a 15-year-old and acts of manual masturbatory contact between the penis of an adult and the private parts of a 7-year-old female were similar for purposes of showing emotional propensity so that no medical testimony was required); *State v. Weatherbee*, 158 Ariz. 303, 762 P.2d 590 (App. 1988) (court allowed three of defendant's daughters from a prior marriage to testify about sexual abuse inflicted upon them by the defendant in a trial in which the defendant is charged with sexually abusing two of his daughters from the current marriage*); State v. Cousin*, 136 Ariz. 83, 664 P.2d 233 (App. 1983)(court found that fondling the vagina of a nine-year-old child, fellatio, vagina fondling, and digital penetration of another child who is eight or nine years old, and vaginal fondling, digital penetration, and oral sex on a third child between the ages of ten and twelve, are all similar acts for purposes of emotional propensity); *State v.*

Superior Court, 129 Ariz. 360, 631 P.2d 142 (App. 1981) (court found that acts of sexual intercourse or attempted sexual intercourse with two sisters approximately 8 years of age, sexual intercourse or attempted sexual intercourse with the defendant's 7-year-old sister, attempted sexual intercourse with a 4-year-old female, and the kidnapping, sexual assault, and child molestation of an 11-year-old boy to be similar enough such that no medical testimony was needed).

D. Rule 404(c)(1)(C)(ii, vii, and viii): All of the charged offenses are sexually aberrant acts.

An aberration has been defined as a deviation from the proper, normal, or typical course. *State v. Beck*, 151 Ariz. 130, 134, 726 P.2d 227, 231 (App.1986). Specific acts that the courts have defined as sexually aberrant include sodomy, child molestation, and lewd and lascivious conduct. *State v. McFarlin,* 110 Ariz. 225, 228, 417 P.2d 87, 90 (1973). In this case, it is self-evident that a 16-year-old boy having oral and anal sex with an 11-year-old boy and a 5-year-old boy is sexually aberrant.

E. Because the other acts were close in time and similar in nature, no expert testimony is required to show that the defendant has a continuing emotional propensity to commit sexually aberrant acts.

The trial court can admit evidence of other acts if it finds that "there is a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged." Rule 404(C)(1)(B), Ariz. R. Evid. 116 Ariz. at 167, 568 P.2d at 1065. In this case, expert testimony is not necessary. The defendant's sexual contact with Morgan is similar to what he did with John-Paul. These acts occurred within a continuous six-month time period. Additionally, the acts are sexually aberrant acts. Thus, no expert testimony is necessary under Rule 404(c).

Nevertheless, if the trial court feels that a propensity hearing is necessary, the State will be ready to present expert witness testimony through Doctor Steven Gray to show that the defendant does possess an emotional propensity to commit sexually aberrant acts.

F. Joinder of all counts is appropriate for reasons of judicial economy.

Interests of judicial economy also dictate that the counts remained joined pursuant to Rule 1.2, Arizona Rules of Criminal Procedure. Arizona case law has long recognized that both offenses and multiple defendants may be joined in the interests of judicial economy. In *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983), the Arizona Supreme Court pointed out that in making that decision, the trial court must balance the possible prejudice to the defendant against the interests of judicial economy. Accord, *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986). See also *State v. Lucas*, 146 Ariz. 597, 601, 708 P.2d 81, 85 (1985).

The Arizona Rules of Criminal Procedure are designed to promote judicial economy. Rule 1.2 states:

> These rules are intended to provide for the just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, **the elimination of unnecessary delay and expense**, and to protect the fundamental rights of the individual while preserving the public welfare.

[Emphasis added.]

If the court grants the motion to sever and rules that Morgan can testify in the trial involving John-Paul and vice-versa, pursuant to Rule 404(C) and A.R.S. § 13-1420, there will be two separate trials. At the separate trials, both Morgan and John-Paul, along with all the other witnesses, will have to testify twice. This will cause enormous

emotional distress to both Morgan and John-Paul. Joinder remains appropriate for reasons of judicial economy, unnecessary delay and expense and promotion of the public's welfare.

IV. CONCLUSION

Severance of the counts is inappropriate in this case. Morgan's testimony about counts one and two is admissible in the trial on count three involving John-Paul, and vice versa, to show that the defendant had a propensity for sexually aberrant acts under Rule 404(c), Arizona Rules of Evidence. Furthermore, joinder is appropriate to promote judicial economy. Because Rule 13.4(b), Ariz. R. Crim. P., states that a defendant is not entitled to sever the charges if evidence of the severed charges are admissible at the trial on the other charges, this Court should deny the defendant's Motion to Sever Counts.